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No. 84-1374

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

C. MACK CAIN,
Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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THE COMMONWEALTH OF VIRGINIA, et al.,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, The Commonwealth of Virginia, et al., respectfully request that this Court deny the petition for a writ of certiorari, which seeks review of the Fourth Circuit's order in this case.

OPINIONS BELOW

The opinion in which certiorari is sought is not reported. A copy of that opinion appears at Pet. app. 24a.

The opinion of the district court (Pet. App. 1a) is reported at 574 F.Supp. 559 (W.D. Va. 1983).

JURISDICTION

The judgment of the Fourth Circuit was entered on October 5, 1984, and a petition for rehearing and suggestion for rehearing en banc was denied on November 16, 1984. (Pet. App. 24a & 42A). A petition for a writ of certiorari was first filed on January 16, 1985. Subsequent filings were made on January 23, 1985, and March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether The Court Of Appeals Erred In Its Holding That Constitutional Due Process And The Virginia Grievance Procedure Were Not Violated When The Agency Appointee To The Grievance Panel Had Participated In A Pre-Termination Discussion But Had Exercised No Authority In The Subsequent Termination Or Grievance.

STATEMENT OF FACTS

Petitioner was employed by the Virginia Department of Rehabilitative Services as a counselor. In April, 1982, he requested the Department's permission to engage in outside employment as a vocational expert. (App. at 106). His request was denied on the basis that such outside employment would constitute a conflict of interests. (Id.). Unknown to the Department, petitioner then sought and obtained the informal opinion of the Virginia Attorney General's Office that such employment during vacation or leave time, and limited to inactive departmental cases, would not constitute a conflict of interests. The opinion directed Petitioner to seek the necessary departmental approval before engaging in such outside employment. (App. at 96). Nonetheless, petitioner subsequently engaged in such employment during work hours, without taking annual leave, and without getting departmental approval. (App. at 99-105). Such activity, if proved, would constitute serious infractions of the Employee Standards of Conduct and could result in termination. (App. at 86-87).

When the Department learned that petitioner had engaged in outside employment, it conducted an investigation. (App. at 99-105). The investigation confirmed that on two occasions petitioner had testified in cases before Administrative Law Judges of the Social Security Administration in West Virginia, that he was compensated for each of these appearances, that they occurred during his normal working hours, and that he had left his work site without permission. (Id.).

Subsequently, the matter concerning petitioner was brought up in an informal conversation during a coffee break at a routine meeting of departmental supervisors. These were John Bergeron, Director of Personnel and Training, David Ziskind, Deputy Commissioner, Charles H. Merritt, an Assistant Commissioner, James Snow, Regional Director, and Kenneth Smith, petitioner's immediate supervisor. The group reviewed the written material at that time, prepared by both agency personnel and by petitioner, and offered their views as to appropriate discipline. Merritt offered his opinion that, on the basis of the material he saw, petitioner should be

terminated. Only Kenneth Smith had the responsibility to make the initial decision regarding disciplinary action. (App. at 121-129, 136-140).

On August 20, 1982, petitioner was given a written notice of the reasons for his discharge. The notice was signed by his immediate superior, Mr. Smith. (App. at 109). That same day, petitioner initiated a grievance.[1] The decision to terminate was upheld at three successive management steps by agency officials other than Merritt. The three management steps in this case involved (1) petitioner's immediate supervisor, Kenneth Smith; (2) the next direct level of management, James Snow, Region I Director; and, finally, (3) Mr. David Ziskind, Deputy Commissioner. (App. at 112).

Merritt holds the position of Assistant Commissioner. In that capacity, he is required to provide the Deputy Commissioner with the agency documentation pertinent to contemplated personnel action. This documentation is then

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[1]The State Grievance Procedure is set forth at § 2.1-114.5:1, Code of Virginia, 1950, as amended.

independently reviewed and a decision rendered by the Deputy Commissioner or Commissioner. Merritt met this responsibility by giving documentation relevant to petitioner's termination to the Deputy Commissioner. Merritt neither had nor exercised authority over the decision of the Deputy Commissioner to sustain the termination of petitioner in the third management step of the State Grievance Procedure. (App. at 136-138). John Bergeron, Director of Personnel, has the authority to review all recommended terminations for consistency and mitigating circumstances. (App. at 82).

After the decision to terminate was upheld at three successive management steps, petitioner requested a hearing. In accordance with the grievance procedures, petitioner designated a member of the grievance panel, and the Department selected Merritt as its panel member. (App. at 116). Merritt conferred with the Attorney General's Office and the Department of Personnel and Training concerning his eligibility to sit on the panel. Both sources determined Merritt to be an eligible panel member. (App. at 132, 135).

Before the panel convened, petitioner filed a civil rights action under 42 U.S.C. §§ 1983 and 1985, seeking a temporary restraining order to enjoin the grievance hearing. (App. at 10). Petitioner claimed that Merritt was not an impartial panel member, alleging that Merritt had participated in the decision to terminate petitioner. The motion was denied. (App. at 14).

The grievance hearing on petitioner's termination commenced on December 14, 1982. Before any evidence was taken, Merritt testified that he could make a fair and impartial decision based on the information to be presented to the panel. (App. 121-122, 125). This testimony was unrebutted. The Chairman of the panel determined that the State policy and procedures preclude an individual from serving on a grievance panel if one has been involved in any of the steps in the grievance procedure, Merritt's involvement occurred prior to the filing of the grievance and therefore, Merritt was a duly authorized member of the panel. (App. 129-130). The hearing then proceeded.

The hearing consisted of approximately 21 hours of testimony over three days during which both sides were represented by counsel. Exhibits were presented and witnesses examined. On January 3, 1983, the panel issued a decision upholding the termination. The majority decision stated that the

> Evidence presented did not substantiate grievant's claims or beliefs. Mr. Cain testified he did not report leave, but he did appear as a vocational expert in Princeton, West Virginia, on the days in question and that he did have a meeting with his supervisor concerning his violations of the Standards of Conduct. (App. at 116).

Petitioner's panel member issued a dissenting opinion based on the severity of the punishment, and the appearance of unfairness by virtue of Mr. Merritt serving on the panel. The dissenter stated that he "agreed with the reasons for the decision" and that he did "not question the integrity of Mr. Merritt...." (App. at 117).

After receiving the adverse panel decision, petitioner filed an Amended Complaint in which he alleged a deprivation of due process based upon Merritt's participation on the panel

and moved for summary judgment. The District Court reasoned that any prior participation by Merritt in the facts under review by the grievance panel deprived petitioner of an impartial panel. The Court granted summary judgment, reinstated petitioner to his prior position pending the appointment and decision of a new grievance panel, directed Merritt, not the agency, to pay petitioner back wages from the date of his dismissal and awarded petitioner his attorney's fees and costs. (App. at 31, 65).

The Fourth Circuit reversed. That Court refused to adopt the per se rule on bias of the District Court. Based on its review of the record, the Court concluded that Merritt did not make the decision to terminate petitioner and did not influence those who did. The Court determined that there was no evidence of actual bias on Merritt's part; rather, the evidence demonstrated Merritt's impartiality. Accordingly, Merritt could sit on the panel. The Court determined that the panel made its decision based on a review of all the evidence, including that which Merritt had seen earlier. The Court also concluded that the record was devoid of any

indication that the Office of the Attorney General and the Department of Personnel and Training erred in their assessment that Merritt could sit.

ARGUMENT

MERRITT'S SITTING ON PETITIONER'S GRIEVANCE PANEL WAS NOT PROHIBITED BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION OR THE GRIEVANCE PROCEDURE.

Petitioner essentially asks this Court to do three things, none of which is a basis for review: (1) to overlook settled principles as constitutional law and, in their place, to adopt a rule that prior involvement with the facts under review is per se impermissible; (2) disregard uncontested findings of the Fourth Circuit and to conclude, based on petitioner's slanted version of the record, that the agency panel member was biased; and (3) to disregard the consistent interpretation Virginia has given its grievance procedure regarding the composition of grievance panels.

1. There Was No Violation Of The Due Process Clause Of The Constitution.

Petitioner's arguments are based on two erroneous conclusions of law: (1) a decision maker cannot review his own decision under Goldberg v. Kelly, 397 U.S. 254 (1970);

and (2) the information which Merritt had from his pre-termination discussion was knowledge from an "extra judicial source" and, under United States v. Grinnell Corporation, 384 U.S. 563 (1966), amounted to impermissible bias.

a. Review Of A Decision By The Decision Maker

It is undisputed that Merritt participated in one informal pre-termination discussion during which he stated that petitioner should be terminated. In Goldberg v. Kelly, supra, 397 U.S. at 271, this Court remarked in closing that a decision maker should not participate in making the determination under review. In Withrow v. Larkin, 421 U.S. 35, 58 n.25 (1975), this Court explained that "when review of an initial decision is mandated, the decision maker must be other than the one who made the initial decision." The Fourth Circuit held that Merritt did not make the decision to terminate. This conclusion is supported by the evidence. Smith recommended termination. (App. at 109). Ziskind terminated petitioner after independently reviewing the investigative facts. (App. at 137). Bergeron reviewed the

decision for consistency and mitigation. (App. at 82). Furthermore, the grievance panel does not sit as an appeal board, see, Va. Code § 2.1-114.5:1(D)(4), and therefore, under Withrow, could in fact be composed of individuals who may have participated in the initial decision under review. See e.g., Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn., 426 U.S. 482, 493 (1976); Vanelli v. Reynolds School District No. 7, 667 F.2d 773, 780 n.12 (9th Cir. 1982); Obrien v. Digrazia, 544 F.2d 543, 546-547 (1st Cir. 1976); Fuentes v. Roher, 519 F.2d 379, 388 (2nd Cir. 1975). Moreover, the Fourth Circuit found no evidence to suggest that Merritt's statement had any binding effect on Smith, Ziskind or Bergeron.

Even if Merritt's opinion could be considered a decision, this Court has held that administrators may review their prior administrative decisions without violating an individual's due process rights. Withrow, supra, 421 U.S. at 35. In Withrow, the Court held that mere exposure to evidence in non-adversarial proceedings is insufficient to disqualify an administrator from later participating in the

adversarial hearing. 421 U.S. at 55. The Court held there is no incompatibility between an agency filing a complaint of probable cause and a subsequent decision on the merits. Withrow, supra, at 57. To adopt a rule which would absolutely bar an adjudicator from deciding a matter with which he was previously involved would bar "any judge who ruled on a motion for a temporary restraining order in a civil action or a motion for bail in a criminal case ... from later hearing the case." Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 517 (4th Cir. 1974). The governing rule, which the Fourth Circuit followed, is that absent evidence of actual bias, an adjudicator is not disqualified simply because of prior involvement with the decision under review.

b. Bias

Petitioner slants Merritt's testimony to make it appear that Merritt had already made up his mind to terminate petitioner prior to the panel hearing, regardless of the evidence presented. Merritt's open-mindedness, which the

Fourth Circuit found persuasive, is well documented in his testimony. On direct examination he testified as follows:

> Q. Are you personally acquainted with the grievant?
>
> A. Yes, I am.
>
> Q. Do you have any personal vendetta against him or any personal dislike of him?
>
> A. No.
>
> Q. Did you make the decision to terminate Mr. Cain?
>
> A. No.
>
> Q. Do you believe that you can fairly and impartially make the decision ... engage in a panel decision based on the facts presented here today?
>
> A. Yes, I think I can make a fair and impartial decision based on the information presented here. (App. at 121-122).

Merritt's reply to questioning by counsel for petitioner on cross examination further reinforces Merritt's lack of partiality:

> Q. And let me ask you one more question. From what you have said, you are of the opinion that we are here today to see if anything else can be offered rather than to review all of those factual circumstances?

A. Well, I see it as both. I think obviously that ... I would hope there would be a complete review of what has transpired, and I would suspect and hope, certainly for the Grievant, that if he has additional information that, you know, that will be presented. (App. at 125).

Petitioner submits that Merritt's one pre-termination statement does not vitiate his statements of impartiality at the time of the panel hearing. Petitioner did not meet his burden of proof to show actual bias.[2] See, Schweiker v. McClure, 456 U.S. 188, 196 (1982).

Merritt's initial knowledge of the case stemmed from exposure to investigative findings prior to the panel hearing. On this basis, petitioner contends that he was prejudiced from an extra-judicial source. In the first place there was no prejudice. Moreover, petitioner's contention ignores the fact that the findings were incorporated into the written notice issued to petitioner and were presented verbatim to the

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[2]Petitioner contends that Merritt's partiality is evident from the fact that a second panel reinstated him. The second panel was convened pursuant to the district court's order and is of no legal significance. Moreover, under the Virginia Grievance Procedure a panel decision is final and binding. See, Virginia Code § 2.1-114.5:1(D)(4), 1950 as amended.

entire panel during three days of testimony. This contention also ignores the case law which has refused to categorize the knowledge gained through prior administrative involvement in a matter as "extra judicial".[3] The contention also would prohibit any employee, with any knowledge of a case, gained through the employment relationship, from sitting on panels. Such a result would essentially dismantle the grievance procedure and is not required for due process.

c. Merritt's Participation on the Panel Did Not Unconstitutionally Taint the Proceeding.

The essential fairness of the hearing petitioner received is manifest. Petitioner had at least four opportunities to confront all the evidence administratively as well as three days of panel hearings during which each witness for the Department was fully cross examined. (App.

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[3]See, e.g., Bowens v. North Carolina Department of Human Resources, 710 F.2d 1015 (4th Cir. 1983), Wolkenstein v. Reville, 694 F.2d 35 (2nd Cir. 1982), cert denied, __ U.S. __, 102 S.Ct. 2452, 77 L.Ed.2d 1333 (1983), Hoska, III v. United States Department of Army, 694 F.2d 270 (D.C. Cir. 1982), PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982), Vanelli v. Reynolds School District, supra, 667 F.2d 773, Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981).

at 101, 106, 112). Nonetheless, petitioner contends that Merritt's presence tainted the panel because petitioner was denied an opportunity to confront all the evidence. In support of this contention, petitioner points to certain evidentiary submissions which the panel refused in whole or in part. These allegations do not demonstrate prejudice. The underlying submissions of which petitioner complains were denied by a unanimous panel. (R. Vol. 1, No. 12, pp. 42-46). Moreover, the lower court made no findings that the panel's conduct was improper. Accordingly, the Fourth Circuit correctly concluded "any hazard arising out of the potential for such bias was alleviated by the fact that all three members of the grievance panel were, at the hearing, made aware of all the same information heard by Merritt during the pre-termination discussion." See Vanelli, supra, 667 F.2d at 780.[4]

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[4]Petitioner contends that Ziskind's presence as an agency witness tainted the panel under Withrow v. Larkin, supra, and Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982). Ziskind had no investigative or prosecutorial duties. Although he made the decision to terminate and acted as third step management official, he neither investigated nor prosecuted. Billings and (Continued)

2. There was no Violation of the Grievance Procedure

The Fourth Circuit noted that there was nothing to suggest that opinions of the Attorney General and the Department of Personnel and Training that Merritt could sit were incorrect. Accordingly that Court gave the opinions great deference. The evidence supports the correctness of the ruling.

The grievance procedure does not prohibit persons who have participated in the underlying facts of a grievance from sitting on a panel; the statute and the implementing regulations expressly prohibit persons with direct involvement in the grievance itself from sitting on a panel. See, Virginia Code § 2.1-114.5:1(D)(4), 1950, as amended; (App. at 91).[5]

Smith investigated and Assistant Attorney General Flippen represented the agency. (App. at 99). Thus, there is no evidence that Merritt was influenced by persons engaged in investigative and prosecutorial functions. Moreover, there is no evidence to suggest that Ziskind's appearance or conduct at the hearing influenced Merritt.

Petitioner also contends that the trial court admonished Merritt not to sit. The court denied petitioner's motion suggesting that his participation was proper (App. at 10) and explicitly refused to tell Merritt he could not sit. (App. at 45).

[5]Section 2.1-114.5:1(D)(4) states in part, "such panel shall not (Continued)

The regulations identified the directly involved individuals to be the grievant, supervisors hearing the grievance at the three management steps, representatives of the grievant at the third step, and witnesses who have appeared at any management step. (App. at 91).

The Virginia Code defines a grievance as a dispute or complaint by an employee relating to, among other things, disciplinary actions taken by the agency. Virginia Code § 2.1-114.5:1(A), 1950, as amended.

Accordingly, persons who participated in petitioner's grievance after it was filed on August 20, 1982, would be prohibited from sitting on the panel. Merritt is not such a person. He was not a supervisor replying at any management steps or witness at any management step. Although he participated in a single impromptu pre-termination discussion pertaining to the agency's investigative facts and the

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be composed of any persons having direct involvement with the grievance being heard by the panel." The regulations provide in part, "such panel shall not be composed of any person having direct involvement with the grievance being heard, such as a grievant's supervisor replying at the three management steps, representatives of the grievant at the third step and the witnesses." (App. at 91).

available disciplinary actions, such participation does not preclude him from sitting on the panel. Indeed, it could not, under any interpretation, be "participation in a grievance," because there was no grievance until after petitioner's dismissal.[6] Merritt's participation occurred prior to petitioner's initiation of the grievance, was therefore not "direct involvement in the grievance," and was permitted under the statute.

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[6]A grievance is statutorialy defined as "a complaint or dispute by an employee relating to ... disciplinary actions, including dismissals ...." Hence, a discussion before the dismissal giving rise to a grievance simply cannot be "direct involvement in the grievance." See, § 2.1-114.5:1(A), 1950 as amended.

CONCLUSION

For the reasons stated above, respondents request that the decision of the Circuit Court be affirmed and the petition for certiorari be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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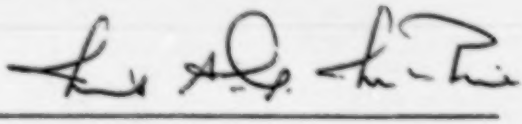
CERTIFICATE

In accordance with Rule 28 of the Rules of the United States Supreme Court I hereby certify that three copies of the foregoing Brief for the Respondents In Opposition were mailed, postage prepaid, this 10th day of May, 1985, to Mary Lynn Tate, Esquire, Yeary & Tate, P.C., 161 East Main Street, Abingdon, Virginia 24210, counsel for petitioner.



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